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APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 532

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.,
a Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

STEWART L. UDALL
1700 Pennsylvania Avenue
Washington, D.C. 20006
Attorney for Petitioner

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APPENDIX A

DOCKET ENTRIES

Date	*Document*
Dec. 13, 1962	Complaint filed
May 22, 1963	Defendant's answer filed
Jan. 20, 1964	Motion to Set, Certificate of Readiness and Request for Jury Trial filed by plaintiff
Feb. 19, 1964	Plaintiff's Motion for Priority trial granted
Apr. 30, 1964	Defendant's Motion to Dismiss and for Preliminary Hearing pursuant to Rule 12(d)
May 19, 1964	Court order granting defendant's Motion for Preliminary Hearing for June 10, 1964, further ordering Pretrial for May 26, 1964, further ordering trial of this cause set for June 15, 1964 at 9:30 a.m. in Division 6 to a jury
May 26, 1964	Pretrial order
June 17, 1964	Trial court's order granting defendant's Motion to dismiss
Jan. 5, 1965	Findings of Fact, Conclusions of Law and Judgment
Apr. 12, 1965	Motion for New Trial on Grounds of Newly Discovered Evidence, Fraud, Other Substantial Reasons Justifying Relief pursuant to amended Rule 60(c) A.R.C.P.
Apr. 12, 1967	3-2 written decision and dissent of the Arizona Supreme Court, *Morgan v. Hays*, supra
Apr. 26, 1967	Application for Relief from Final Judgment on Grounds of Newly Discovered Evidence, Fraud, Other Substantial Reasons Justifying Relief filed in Supreme Court, State of Arizona
May 9, 1967	Order denying relief without prejudice to proceed in the Superior Court

May 19, 1967	Amended and Supplemental Motion for New Trial on Grounds of Newly Discovered Evidence, Fraud, Other Substantial Reasons Justifying Relief filed in Superior Court pursuant to Supreme Court order
July 25, 1967	Trial court's order denying plantiff's Motion for New Trial under Rule 60(c) A.R.C.P.
Jan. 6, 1970	Court of Appeals of Arizona, Division One, Dept. B, opinion upholding trial court.
Feb. 19, 1970	Court of Appeals of Arizona order denying rehearing
March 17, 1970	Arizona Supreme Court order denying petition to review

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

ROBERT D. MORGAN,
Petitioner,
vs.
JACK D. HAYS, Judge, Superior Court of the State of Arizona, in and for the County of Maricopa, and said SUPERIOR COURT,
Respondents,
and
METRO-GOLDWYN-MAYER, INC.
Real Party in Interest

No. 8653

Review by Certiorari from the Superior Court
The Honorable Jack D. Hays, Judge
AFFIRMED

SNELL & WILMER — Phoenix
by Mark Wilmer
Attorneys for Petitioner

RICHARD J. DANIELS — Phoenix
JENNINGS, STROUSS, SALMON & TRASK — Phoenix
by Rex H. Moore
by Rex E. Lee
Attorneys for Respondents and Real Party in Interest

McFarland, Justice:

Robert D. Morgan, hereinafter referred to as petitioner, filed a petition with this court seeking issuance of a writ of certiorari

to test the propriety of the granting of a motion to dismiss by Jack D. Hays, Judge of the Superior Court, Maricopa County, hereinafter referred to as respondent, in an action brought by petitioner against Metro-Goldwyn-Mayer, Inc. a Delaware corporation, real party in interest, hereinafter referred to as MGM.

Petitioner filed a complaint in Superior Court, Maricopa County, Arizona, on December 13, 1962, against MGM in which he alleged that on April 9, 1962, while in the employ of MGM in the capacity of a "stunt man" in the production of a motion picture "How the West Was Won," being filmed in part in Maricopa County, petitioner was injured through negligence of MGM, and suffered severe injuries as a result of said negligence. On April 30, 1964, MGM, through its attorneys, filed a motion to dismiss under Rule 12, Arizona Rules of Civil Procedure, claiming that the court lacked jurisdiction over the subject matter of the claim for relief, and sought an order setting this motion for preliminary hearing to the court. Respondent ordered the preliminary hearing on the motion to dismiss by minute entry of May 19, 1964. Petitioner filed with this court a petition for writ of certiorari on June 4, 1964, seeking relief from the order of respondent granting a preliminary hearing on MGM's motion to dismiss for lack of jurisdiction over the subject matter, on the grounds that petitioner was entitled to a jury trial. We denied this petition by order of June 9, 1964.

After a hearing lasting four days, respondent took the motion under advisement, and advised counsel that he was declining to rule upon the jurisdictional questions in advance of trial, and that the jury trial on the issue of common law negligence and damages would proceed. MGM then filed a petition for a writ of mandamus with this court. We granted a peremptory writ on June 17, 1964, which commanded respondent:

> ". . . forthwith to rule on the matter of jurisdiction of said court in the above-entitled matter before proceeding to trial."

By order of June 17, 1964, respondent granted MGM's motion to dismiss for lack of jurisdiction, and in his findings of fact and

conclusions of law respondent found that petitioner's exclusive remedy was vested either in the Industrial Accident Commission of the State of California, or The Industrial Commission of Arizona, and:

> "By virtue of the foregoing conclusions, this Court does not have jurisdiction over the subject matter of this lawsuit and therefore the defendant's Motion to Dismiss should be granted and this cause should be dismissed and judgment should be entered in favor of the defendant."

The judgment of dismissal for lack of jurisdiction was filed on January 5, 1965. Petitioner filed his notice of appeal on February 26, 1965, but the appeal was not perfected by filing within sixty days a bond for costs as required under Rule 73(b), Arizona Rules of Civil Procedure, as amended 1961.

Petitioner then filed a petition for writ of certiorari with the Court of Appeals of Arizona, Division one, which was denied.

The petition was then presented to this court, and we granted the writ of certiorari for the purpose of passing upon the question of whether the petitioner was entitled to a trial by jury on the question of whether he had made an election to receive compensation under the Workmen's Compensation Act. It is the contention of the petitioner that the trial court erred in denying a jury trial. This court is committed to the rule that a question of election to take under the Workmen's Compensation statute is a preliminary question to be decided by the trial court prior to jury trial. State v. Pressley, 74 Ariz. 412, 250 P. 2d 992.

If petitioner was covered by workmen's compensation, then his compensation would be determined by The Industrial Commission of Arizona, and the superior court would not have jurisdiction to try the issues presented; therefore, under the procedure that has been followed in this state for some fourteen years, the court must first determine whether it has jurisdiction before trying a case.

In State v. Pressley, supra, we held the question of election to

take under the workmen's compensation statute is a preliminary question to be decided by the trial court prior to trial:

"Is the trial court the proper tribunal to determine whether Pressley has made an election? The answer is Yes. Next, is it the duty of the trial judge or the jury to decide that question? The answer: the trial judge should decide that question as a matter of law.

* * *

"In Taylor v. Hubbell, supra [188 F. 2d at page 109], the court held that the question of election was one of law for the trial judge to decide, and said this:

"'It is axiomatic that "Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist." [Cases cited.] Here the district court had jurisdiction of the subject matter only if plaintiff and Sanderson & Porter were "not in the same employ" and if plaintiff had not made an election under the statute to take compensation. S. H. Kress & Co. v. Superior Court, supra, 66 Ariz. 67, 182 P.2d 931. Being jurisdictional, these issues were triable to the court, not the jury. And the district court properly withheld them from consideration by the jury . . . .'

"Wright on Subrogation, supra, page 79, section 36, says:

"'The authority of the employer, insurer or assignee to prosecute a cause of action under the subrogation statute has been held to be a preliminary question of law to be heard and determined by the trial judge and not an essential part of the plaintiff's cause triable by the jury.'

* * *

"To recapitulate, we affirm the second Pressley case in all respects. We further order, the alternative writ of mandamus heretofore issued be made preemptory and the commission be allowed to intervene; that the commission be allowed subrogation to any and all of Pressley's rights against the third party for payments made for 'accident benefits' received by Pressley;

and that the trial judge hear and decide the question of election as a matter of law before proceeding with the trial of the case on its merits." 74 Ariz. at 415, 417, 422; 250 P. 2d at 995, 996, 999

See also State ex rel. Industrial Commission v. Reese, 74 Ariz. 425, 250 P. 2d 1001.

In the Pressley case, supra, we followed the general rule, as stated in 20 Am. Jur. 2d, Courts, § 92:

"§ 92. Power and duty to determine jurisdiction.

"A court has the power and duty to examine and to determine whether it has jurisdiction of a matter presented to it, its determination being subject, of course, to appellate review. This question should be considered by the court before it looks at other matters involved in the case, and before determining whether the parties are entitled to a jury trial if the court has jurisdiction of the case . . . ." 20 Am. Jur. 2d at 453

The rule is also set forth in 21 C.J.S. Courts, § 113, as follows:

"§ 113. Power of Court to Determine Its Own Jurisdiction

"Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction. The court necessarily decides that it has jurisdiction by proceeding in the cause.

"When at any time or in any manner it is represented to the court that it has not jurisdiction, the court should examine the grounds of its jurisdiction before proceeding further, the question of jurisdiction being always open for determination. The court may receive testimony on a preliminary question to determine its jurisdiction, and is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment." 21 C.J.S. at 174, 175

In the case of Burgess v. Gibbs, 262 N.C. 462, 137 S.E. 2d 806, the court said:

"Among other defenses, the answer of the defendant alleges as a plea in bar to plaintiff's action his immunity to suit at common law by plaintiff in this case and his nonliability under the provisions of G.S. § 97-9 and G.S. § 97-10.1 of the N.C. Workmen's Compensation Act.

"A universal principle as old as the law, is that the proceedings of a court without jurisdiction of the subject matter are a nullity. High v. Pearce, 220 N.C. 266, 17 S.E. 2d 108. If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit. In re Davis v. Custody, 248 N.C. 423, 103 S.E. 2d 503. This is necessary, to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment. * * * So, *ex necessitate*, the court may, on plea, suggestion, motion, or *ex mero motu*, where the defect of jurisdiction is apparent, stop the proceeding.' Branch v. Houston, 44 N. C. 85.

"When the trial judge in the absence of the jury heard and decided all questions relating to the court's jurisdiction to entertain the instant action, he followed the sound rule that every court necessarily has inherent judicial power to inquire into, hear and determine the questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction. [Cases cited.]

"In Bridges v. Wyandotte Worsted Co., supra, [243 S.C. 1, 132 S.E. 2d 18], the Court said:

"'The issue of jurisdiction is basically one of law. It involves the determination by the court of its right to proceed with the litigation. A decision of this question by the court deprives a litigant of no right to a jury trial of the issue of liability because, if the court has no jurisdiction, the litigants have no rights which they may assert in that court. The right to have a jury pass upon the controverted factual issues must of necessity relate

to the assertion of the right of the litigant which has been allegedly violated, which presupposes a court having jurisdiction to grant the relief sought. The determination of the jurisdictional question by the court is not a denial of any constitutional right of a litigant to a jury trial, but simply a determination of the forum in which those rights may properly be asserted. The decision of the question of whether the court has jurisdiction is a preliminary one to the determination of the merits of the cause, and is for the court to decide . . ." 93 S.E. 2d at 807, 808

In Adams v. Davison-Paxon Company, 230 S.C. 512, 96 S.E. 2d 566, the court stated the same rule:

"It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision of the court which includes the finding of the facts which relate to jurisdiction. [Cases cited.]

"Thus the trial court should have in this case resolved the conflicts in the evidence and determined the fact of whether Emporium was performing a part of the trade, business or occupation of the department store-appellant and, thereby, whether respondent's remedy is exclusively under the Workmen's Compensation Law . . ." 96 S.E. 2d at 571, 572.

Petitioner relies most heavily on the case of Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 2 L.Ed. 2d 953, 78 S.Ct. 893, in which the Supreme Court of the United States refused to follow the procedure of the state court in South Carolina; however, in doing so, it is recognized a distinction in the procedure in the federal courts and that in the state courts which distinction is specifically applicable in the State of South Carolina.

The Court stated:

"We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury

But clearly there is not present here the certainty that a different result would follow; cf. Guaranty Trust Co. v. York, 326 U.S. 99, 89 L.Ed. 2d 2079, 65 S.Ct. 1464, 160 A.L.R. 1281, supra, or even the strong possibility that this would be the case, cf. Bernhardt v. Polygraphic Co. of America, Inc. 350 U.S. 198, 100 L.Ed. 199, 76 S.Ct. 273, supra. There are factors present here which might reduce that possibility. The trial judge in the federal system has powers denied the judges of many States to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disrupted factual issues to yield to the state rule in the interest of uniformity of outcome." 2 L. Ed. 2d at 963, 964

We would also call attention to the fact that this was not a unanimous opinion, and the dissenting opinion, as stated by Justice Whittaker, succinctly states why we should not depart from Pressley, supra.

"It thus seems to be settled under the South Carolina Workmen's Compensation Law, and the decisions of the highest court of that State construing it, that the question whether exclusive jurisdiction, in cases like this, is vested in its Industrial Commission or in its courts of general jurisdiction is one for decision by the court, not by a jury. The Federal District Court, in this diversity case, is bound to follow the substantive South Carolina law that would be applied if the trial were to be held in a South Carolina court, in which State the Federal District Court sits. Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487. . . .

* * *

. . . [W]e are dealing with a right to recover derived not from the United States but from one of the States. When, because the plaintiff happens to be a non-resident, such a right is enforceable in a federal as well as in a State court, *the forms and*

mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic . . ." 2 L.Ed. 2d at 968, 969

Justice Whittaker does not follow the reasoning of the majority in holding that the difference in the procedures allowing the "judges of many States to comment on the weight of evidence and credibility of witness, etc.," as sufficient safeguard against affecting the substantial rights of the parties.

Petitioner has also cited a number of Arizona cases which he contends supports his position, which were decided prior to our decision in Pressley, supra. We do not deem it necessary to comment on these cases, for the members of the court were aware of them at the time of the decision in Pressley. We also call attention to the fact that such cases as Boyden v. Lamb, 152 Mass. 416, 25 N.E. 609 (1890), and Coghlan v. White, 236 Mass. 165, 128 N.E. 33 (1920), dealt with a waiver of the right to bring court damages after electing to receive compensation. In a more recent case, Nealon v. Sullivan, 334 Mass. 213, 134 N.E. 2d 886 (1956), the Massachusetts court, in determining the question of whether an election in a workmen's compensation case should be decided by the judge or the jury, the court stated:

". . . If having accepted compensation he prosecutes an action at law against such other person, a preliminary question is presented to the court whether such action was authorized. This question is to be decided by the judge. (Citing cases)" 134 N.E. 2d at 889

State v. Pressley was decided after mature consideration. Such a case should not be overruled unless it is required by impelling reasons. We find no such reasons to permit the question of jurisdiction to be submitted to a jury in the trial of the case on the merits which might well result in a two or three week trial in a case where the court would have to direct a verdict in favor of a defendant under the evidence. We do not feel that the rule (Rule 42(b) Arizona Rules of Civil Procedure, 16 A.R.S., as amended 1966) permitting the court to order a separate trial on the ques-

tion of jurisdiction would be sufficient to overcome this objection, in that it would require delay and determination by the court as to whether the facts in each case would justify such a separate trial. We have held — in State ex. rel. Industrial Commission v. Reese, 74 Ariz. 125, 250 P.2d 1001 — that the Industrial Commission has a right to intervene in a question of jurisdiction. Such an intervention might also result in confusion, if the question of jurisdiction were decided by the jury.

Petitioner also contends that the court erred in that the facts did not support the court's holding that it did not have jurisdiction. One of the grounds given by the court below in so holding was that petitioner had made a waiver under § 23-1024. The court stated:

> "The plaintiff, by making a claim for Workmen's Compensation benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer."

This conclusion of the court was supported by its findings of facts:

> "29. Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.
>
> "30. On April 16 and again on April 19, 1962, when plaintiff was interviewed by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that this benefits would be 65% of $1,000.00 per month.

"31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commission of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices or availablity of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

"32. After consulting with said attorneys and on or about April 23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled 'Workman's Report of Injuries and Application for Benefits'."

The court went on to find the claims had been presented, and petitioner was paid compensation in a total sum of $4,795.41, and medical and hospital expense in the sum of $15,246.70. These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been a waiver. Since the waiver alone is sufficient, it is not necessary for us to pass upon the other matters raised by the petitioner in regard to the jurisdiction of the court, and having decided this case upon its merits it is not necessary for us to pass upon the propriety or the timelessness of the filing of the writ of certiorari after the time for appeal has expired.

Judgment affirmed.

ERNEST W. McFARLAND, Vice Chief Justice

CONCURRING:

JESSE A. UDALL, Justice

LORNA E. LOCKWOOD, Justice

STRUCKMEYER, Justice, dissenting.

The majority, in reaffirming the holding in State v. Pressley, 74 Ariz. 412, 250 P.2d 992, have compounded the error initiated by the language used in S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 Pac. 931 (1947). The error now results in denying petitioner the right to trial by jury guaranteed by Article 2, § 23 of the Constitution of this state.

PETITIONER'S RIGHT TO SUE

By Article 18, § 6 of the Constitution of Arizona, adopted at statehood in 1912, employees were guaranteed a right of action to recover damages for personal injuries suffered during the course of employment.

"The right of action to recover damages for injuries shall never be abrogated; * * *." Art. 18, § 6, Const. of Arizona.

Of Article 18, § 6, we said:

"Taken into consideration with the preceding sections 4 and 5, it is beyond question that the 'right of action to recover damages for injuries . . .' therein mentioned is the common-law action of negligence, * * *." Alabam's Freight Co. v. Hunt, 29 Ariz. 419, 443, 242 Pac. 658.

We also said:

"It is urged that this provision makes the former common-law action for negligence a constitutional one, and that it cannot be abrogated by the legislature. We think there is no question that this proposition, stated in the abstract, is correct." Moseley v. Lily Ice Cream Co., 38 Ariz. 417, 420; 300 Pac. 958.

Thereafter, the people of Arizona, in 1925, amended the Constitution to provide for a workmen's compensation law.

"The legislature shall enact a Workmen's Compensation Law * * * by which compensation shall be required to be paid to any such workman in case of his injury * * *; provided that it shall be optional with any employee engaged in such private employment to settle for such compensation, or to retain the

right to sue said employer as provided by this Constitution; * * *." Art. 18, § 8, Const. of Arizona.

This amendment gives an employee alternative remedies where the employee has received personal injuries. He has the option to bring suit against those responsible for his injuries or to take the benefits conferred by workmen's compensation. It does not restrict the right of action to recover damages; it simply gives an injured workman an additional remedy, the right to take compensation if he so chooses.

The legislature did enact a workmen's compensation law. It recognized and reinforced the plain language of the Constitution by providing that it would be optional with an employee as to whether he accepted compensation or retained the right to sue the employer. Laws of 1925, Ch. 83, § 60, now A.R.S. § 23-906, subsec. A.[1] By subsections B, C, D and E of § 23-906,[2] the legis-

[1] "A. Employers who comply with the provisions of § 23-961 as to securing compensation shall not be liable for damages at common law or by statute, except as provided in this section, for injury or death of an employee wherever occurring, but it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law."

[2] "B. The employee's election to reject the provisions of this chapter shall be made by a notice in writing, signed and dated by him and given to his employer, in duplicate in substantially the following form:

"To (name of employer):

You are hereby notified that the undersigned elects to reject the terms, conditions and provisions of the law for the payment of compensation, as provided by the compulsory compensation law of the state of Arizona, and acts amendatory thereto.

"C. The notice shall be filed with the employer prior to injuries sustained by the employee, and thereafter within five days the employer shall file with the commission the duplicate of the notice so served by the employee. All employees shall be conclusively presumed to have elected to compensate in accordance with the terms, conditions and provisions of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury.

"D. Every employer engaged in the occupations designated in this chapter shall post and keep posted in a conspicuous place upon his

(Continued on Page A-16)

lature provided the circumstances by which the employee signified his acceptance of the election to take compensation, thus waiving the right to sue guaranteed by Article 18, §6.

It will be noticed that in subsection B the statute uses the word "election" and in subsections C and D "elected". This election is an election of remedies.

> "An election of remedies has been defined as the act of choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. The phrase is also used in a more restrictive sense to denote the doctrine that the adoption, by an unequivocal act, of one or two or more inconsistent remedial rights has the effect of precluding a resort to the others." 25 Am.Jur.2d, Election of Remedies, p. 646.

"An election of remedies is an affirmative defense. It must be pleaded by the party who asserts it and the burden of proof is on him to establish it." Kuhl v. Hayes, 212 F.2d 37. And see Bagwell v. Susman, 165 F.2d 412.

"But, apart from that, it is not the plaintiff's burden to prove

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(Continued from Page A-15)

premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form:

"All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected to accept compensation under the terms of such law; and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that blanks and forms for such notice are available to all employees at the office of this company."

"E. If an employer fails to post and keep posted the notice as required by this section, or fails to keep available at the place where the employees are hired the blank forms of notice to be signed by the employee, no employee who thereafter engages in employment for such employer, during the time that the notices are not posted or during the time that the blanks are not available, shall be deemed to have accepted the provisions of this chapter, and it shall be optional for such employee, if injured during the period when blanks were not available or the notice was not posted, to accept compensation under the provisions of this chapter or maintain other action against the employer."

that his action is outside the scope of the Workmen's Compensation Act, N.J.S.A. 34:15-1. Compare Butler v. Eberstadt, 113 N.J.L. 569, 175 A. 159. That would be a matter of defense to be advanced by the defendant." Dailey v. Mutual Chemical Co. of America, 125 N.J.L. 465, 16 A.2d 557, Aff'd. 126 N.J.L. 426, 19 A.2d 778.

As an affirmative defense, an election of remedies cannot be raised by a motion to dismiss as was done in the instant case. Macias v. Klein, 106 Fed.Supp. 107; Southern Farmers Asso. v. Wyatt, 234 Ark. 649, 353 S.W.2d 531; Household Finance Corp. v. Suhr, 44 Ill.App.2d 292; Vitarelli v. Brunson Const. Corp., 235 App.Div. 804, 256 N.Y.S. 637; Hanover Estates, Inc. v. Finkelstein, 194 Misc. 755, 86 N.Y.S.2d 316; Saso v. State, 20 Misc.2d 826, 194 N.Y.S.2d 789; New Hanover County v. Sidbury, 225 N.C. 679, 36 S.E.2d 242.

The choice, denominated an election by the statute, is essentially a waiver of the right of action to recover damages for injuries guaranteed to petitioner by Article 18, § 6 of the Constitution. The essence of a waiver is that there be an opportunity of choice between the relinquishment and the enforcement of a right. Arizona Title Guaranty & Trust Co. v. Modern Homes, 84 Ariz. 399, 330 P.2d 113. It is the intentional relinquishment of a known right. Murphey v. Valenzuela, 95 Ariz. 30, 386 P.2d 78; City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411; In re Brandt's Estate, 67 Ariz. 42, 190 P.2d 497; Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224; Southwest Cotton Co. v. Valley Bank, 26 Ariz. 559, 227 Pac. 986.

Waiver must be pleaded affirmatively.

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, *waiver*, and any other matter con-

stituting an avoidance or affirmative defense. * * *" Rule 8(d), Rules of Civil Procedure, 16 A.R.S. (Emphasis supplied.)

And see Allstate Insurance Co. v. Moldenbauer, 193 F.2d 663; Western Casualty and Surety Co. v. Beverforden, 93 F.2d 166; Hunter Milling Co. v. Koch, 82 F.2d 735.

The burden of proving waiver is upon the party claiming or asserting it. Cowles v. Ohio Farmers Insurance Co., 242 F.2d 73; Buffum v. Chase National Bank, 192 F.2d 58, cert. denied 342 U.S. 944, 96 L.Ed. 702, 72 S.Ct. 558. Waiver is a question of fact for the jury where the facts are disputed. Cannon v. Travelers Indemnity Co., 314 F.2d 657; Albert v. Joralemon, 271 F.2d 236; Home Indemnity Co. v. Allen, 190 F.2d 490; Ross Engineering Co. v. Pace, 153 F.2d 35. "The cases uniformly hold that questions of waiver are questions of fact to be submitted to the jury." Ross Engineering Co. v. Pace, supra, 153 F.2d 35, 50.

It is, of course, immaterial whether the selection of one or the other of the options provided in the Constitution, Art. 18, § 8, is denominated a waiver or an election of remedies. The result is the same.

> "An employer who contends that he is one of a class of persons protected from an action at law by the Workmen's Compensation Act must plead and prove the conditions necessary to bring himself within the statute. The employee is pursuing a common law remedy which existed before the enactment of the statute and which continues to exist in cases not covered by the statute. It is incumbent upon the employer to prove that the Workmen's Compensation Act is a bar to the employee's ordinary remedy." Popejoy v. Hannon, 97 Cal.2d 159, 231 P.2d 484.

At this point it might be well to summarize: One, the Constitution, by Article 18, § 6, gives petitioner a right of action to recover damages for his personal injuries — a right which "shall never be abrogated." Two, the subsequent amendment, Article 18, § 8, gives him an additional right, that is, a choice between the

right to sue or to take compensation without suit. Three, the legislative enactment, § 23-906, since it can neither augment nor diminish the right to sue granted by the Constitution, simply provides the time when and method by which the election or waiver of that right is evidenced. And four, the assertion of an election or waiver by the employer is an affirmative defense not to be determined on motion, but as any other contested factual issue.

PETITIONER'S RIGHT TO TRIAL BY JURY

By the Constitution, Article 2, § 23, the people of this state have provided:

"The right of trial by jury shall remain inviolate, * * *." We have said repeatedly that the Constitution does not give the right to trial by jury, but its purpose is to guarantee a preservation of the right. Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479; State v. Cousins, 97 Ariz. 105, 397 P.2d 217; Brown v. Greer, 16 Ariz. 215, 141 Pac. 841. Since the Constitution preserves a jury trial in the common-law action of negligence. Alabam's Freight Co. v. Hunt, 29 Ariz. 419, supra, it would seem beyond the possibility of quibbling that Morgan should have had a jury trial on Metro-Goldwyn-Mayer's affirmative defense that he elected to take under the Workmen's Compensation Act, thereby waiving his common-law action.

> "It is fundamental that the California Constitution preserves to litigants the right to jury trial as it existed at common law in 1850. * * * The legislature may not, directly, or in the guise of procedural changes or changes in remedy, deprive a litigant of a jury in a case formerly triable at law. People v. Kelly, 203 Cal. 128, 133, 263 P. 226. People v. One 1941 Chevrolet Coupe, supra, 37 Cal.2d 283, 299, 231 P.2d 832." Ripling v. Superior Court, 112 Cal.App.2d 399, 247 P.2d 117.

How is it, then, that the majority of this Court now concludes, in the face of such plain, unequivocal, constitutional language that the question of petitioner's waiver of his constitutional right of action is to be determined by the trial judge?

The words of Jusice Frankfurter, in his dissent to Yonkers v. United States, 320 U.S. 685, 695, 88 L.Ed. 400, 64 S.Ct. 327, capsulizes the problem here:

> "'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls."

We have here a simple case in which the petitioner is seeking to exercise his constitutional right but the majority persist in talking about "jurisdiction."

The Arizona Constitution, Article 18, § 6, speaks of the "'right of action' to recover damages." The right to bring suit to obtain the relief sought is a "right of action." It is the right to pursue a remedy.

> "At the risk of being elementary, it is well to define certain terms — the more so as they have been, at times, a source of confusion. The right of action is merely the right to pursue a remedy." Yankwich, J., in United States v. Standard Oil Co. of Calif., 21 Fed.Supp. 645, 660.

And see Adams v. Albany, 80 Fed. Supp. 876; Foster v. Humburg, 180 Kans. 64, 299 P.2d 46; Douglas v. Daniels Bro. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195, 125 A.L.R. 761; Landry v. Acme Flour Mills, 202 Okla. 170, 211 P.2d 512; Eastside etc. Co. v. Southeast Portland Lumber Co., 155 Ore. 367, 64 P.2d 625; Elmo v. Gaines (Tex.), 282 S.W. 835; Seymour v. Richardson, 194 Va. 709, 75 S.E.2d 77.

The statute does not confuse "jurisdiction" with the "right to pursue a remedy."

> "The right to recover compensation pursuant to the provisions of this chapter for injury sustained by an employee shall be the exclusive *remedy* against the employer, except as provided by §§ 23-906 * * *." A.R.S. § 23-1022. (Emphasis supplied.)

It says the right to recover compensation shall be the remedy.

The error in confusing jurisdiction with the petitioner's right to pursue a remedy in the superior court originated in S. H. Kress

Co. v. Superior Court, 66 Ariz. 67, 182 P.2d 931. There, a suit was brought by a minor, age thirteen, against the Kress Company for his personal injuries. The Kress Company brought a writ of prohibition in this Court. In the course of the decision holding that a minor could make a valid election, the Court said:

> "* * * it is the prime contention of the respondent that in light of the constitutional provision heretofore quoted, the child labor laws of our state and sections of our Workmen's Compensation Law that the child involved in this case was not sui juris to make a binding election before injury so as to make the Workmen's Compensation Act his exclusive remedy, and the writ of prohibition in this case should not issue since the Superior Court has jurisdiction to hear this case."

It then said this:

> "Statutes direct that the Superior Court has no jurisdiction to hear this case if the injured boy's exclusive remedy is under the Workmen's Compensation Act, for the right to appeal is by statute only * * * and the only appeal given from an award of the Commission is by Sec. 56-972, A.C.A. 1939. * * *" 66 Ariz. at 72.

This latter statement is palpably a non sequitur. The right to appeal from an award of the Industrial Commission is, of course, given by statute exclusively to the Supreme Court; but respondent, as plaintiff in the superior court, was not attempting to appeal an award of the Commission. He was seeking to invoke a right of action guaranteed by the Constitution of Arizona, Article 18, § 6, supra. The Industrial Commission, by processing the claim under legislative acts, could not oust the jurisdiction granted to the superior court by Article 6, § 14 of the Constitution of Arizona to hear and determine respondent's case.

"Jurisdiction is the power to decide a case on its merits." Silver Corp. v. Bowen, 98 Ariz. 77, 402 P.2d 22. It is not dependent upon the unsuccessful assertion of a defense such as accord and satisfaction, contributory negligence, estoppel, failure of consider-

ation, fraud, laches, release, limitation of actions, waiver or election. These are defensive matters which, if found to be true, would defeat recovery on a plaintiff's right of action. It would be an absurdity, to which this Court would not for one moment listen, were it urged, for example, that contributory negligence, fraud, estoppel or laches could be raised by a motion to dismiss and decided by the trial judge without submission to a jury by the occult device of labeling the issue "jurisdictional."

In March, 1951, the United States Court of Appeals, Ninth Circuit, decided Taylor v. Hubbell, 188 F.2d 106. There, it seized upon the language of the Kress case, saying:

> "* * * And where allowance by the commission is the exclusive remedy of an injured workman the Arizona courts have no 'jurisdiction to hear' an action for damages. S. H. Kress & Co. v. Superior Court, 1947, 66 Ariz. 67, 182 P.2d 931, 934." 188 F.2d at 108

and concluded:

> "Being jurisdictional, these issues [as to whether there had been an election] were triable to the court not the jury." 188 F.2d at 109.

This error was perpetuated the following year in State ex rel. Industrial Commission v. Pressley, Nov. 1952, 74 Ariz. 412, 250 P.2d 992, wherein this Court quoted from and followed Taylor v. Hubbell without serious analysis.

Palpably, there is here no question of jurisdiction. The matter is as simple as this: If the jury determines the election against the plaintiff in the superior court, judgment should be entered in defendant's favor. The determination of whether the exclusive remedy is in the Commission is just another factual issue to be decided as all factual issues have been decided from time immemorial under the Anglo-American jury system.

I cannot acquiesce in this Court's disposition of the case. The language of the Kress decision, misapplied in Pressley and now stubbornly adhered to, whittles away at one of the most valuable

of constitutional rights so that now a workman of this state may not have a jury resolve this dispute with his employer.

I dissent.

FRED C. STRUCKMEYER, JR., Justice

CHARLES C. BERNSTEIN, Chief Justice

APPENDIX C

ROBERT D. MORGAN, Appellant,

v.

METRO-GOLDWYN-MAYER, INC., a Delaware corporation, Appellee.

No. 1 CA-CIV 746.

COURT OF APPEALS OF ARIZONA,

Division 1.

Department B.

Jan. 6, 1970.

Rehearing Denied Feb. 19, 1970.

Review Denied March 17, 1970.

Charles M. Brewer, Phoenix, for appellant.

Jenning, Strouss & Salmon, by Rex H. Moore, Rex E. Lee, Phoenix, for appellee.

Robert K. Park, Phoenix, for State Industrial Commission.

EUBANK, Presiding Judge.

This case is before this Court for the second time. It was originally here on appellant's petition for a writ of certiorari under Docket No. 1 CA-CIV 132, which was denied on April 19, 1965. Thereafter the Arizona Supreme Court granted the writ and rendered an extensive decision on the merits of the case, which decision, as we will point out, is dispositive of questions raised on this appeal. This prior decision is Morgan v. Hays and Metro-Goldwyn-Mayer, Inc. 102 Ariz. 150, 426 P.2d 647 (1967), cert. denied, 389 U.S. 859, 88 S.Ct. 105, 19 L.Ed.2d 125 (1967). It involves the same parties standing in the same capacity as they do in this matter and, upon analysis, involves the same legal issues.

In the prior decision Robert D. Morgan, hereinafter referred to as appellant, sued Metro-Goldwyn-Mayer, hereinafter referred to as MGM, his employer, in the Maricopa County Superior Court

for damages arising from his personal injuries which allegedly resulted from MGM's negligent conduct. MGM moved to dismiss the complaint alleging that the Superior Court lacked jurisdiction over the cause of action by reason of the appellant electing to take coverage under the State Workmen's Compensation Act by applying for and receiving compensation benefits. At the same time, MGM sought an order setting this motion for preliminary hearing to the trial court. The trial court granted the motion for the preliminary hearing and appellant petitioned the Supreme Court for a writ of certiorari, alleging that such a hearing deprived appellant of a jury trial on the fact issue of waiver. The writ was denied and the hearing was held, after which the trial judge advised counsel that he declined to rule on the jurisdictional question in advance of the jury trial. MGM then petitioned for a writ of mandamus in the Supreme Court requesting that the trial court be ordered to rule on the jurisdictional question immediately. The Supreme Court agreed with MGM and granted a preemptory writ ordering the trial court to rule, after which the trial court did rule and granted MGM's motion to dismiss for lack of jurisdiction. The trial court filed findings of fact and conclusions of law in support of its dismissal order concluding that appellant's exclusive remedy was vested either in the Industrial Accident Commission of the State of California, or the Industrial Commission of Arizona, and that the trial court had no jurisdiction over the matter.

Appellant then filed his notice of appeal but failed to file his cost bond, as required by Rule 73(b), Arizona Rules of Civil Procedure, and thereby failed to perfect his appeal. He then petitioned this court for a writ of certiorari, which was denied. The writ was subsequently granted by the State Supreme Court and the Morgan v. Hays decision, supra, resulting from that hearing. The Supreme Court, in its decision, affirmed the trial court's judgment of dismissal. For a discussion of that decision, see Skarecky, Workmen's Compensation—Election of Remedies—Question of Election is One of Law to be Decided by Trial Court.

Morgan v. Hays (Ariz. 1967), 9 Ariz. L. Rev. 543. In its opinion the Supreme Court based its affirmance on two grounds: First, that a question of election to take under the Workmen's Compensation statute is a preliminary question to be decided by the trial court prior to jury trial, which was properly disposed of by the trial court; and Second, that the findings of fact of the trial court, on the issue of appellant's waiver to sue MGM under A.R.S. Section 23-1024, were substantially supported by the evidence.

Following the issuance of the mandate, the appellant returned to the trial court and filed an amended and supplemental motion for new trial[1] under Rule 60(c), Rules of Civil Procedure, 16 A.R.S. This motion was considered and denied by the trial court and this present appeal results from the denial of that Rule 60(c) motion. A motion under Rule 60(c) is addressed to the discretion of the trial court and the result reached by that court will be sustained on appeal unless the record on appeal demonstrates a clear abuse of that discretion. Eldridge v. Jagger, 83 Ariz. 150, 317 P.2d 942 (1957); Haenichen v. Worthington, 9 Ariz. App. 83, 449 P.2d 319 (1969).

Appellant raises three questions on appeal: First, did the trial court abuse its discretion in denying plaintiff's motion for a new trial pursuant to Rule 60(c), Rules of Civil Procedure; Second, were the facts shown upon plaintiff's motion for new trial such as would probably have changed the result, should a new trial be granted; and, Third, was the appellant required to show due diligence in securing the facts and evidence relied upon in his motions for new trial?

MGM raises a preliminary question which must be disposed of prior to the consideration of the appellant's questions, that is, whether the appeal should be dismissed as moot because the prior judgment of the Arizona Supreme Court in Morgan v. Hays, supra, is now res judicata and dispositive of the rights of

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[1] Actually a motion to set aside the judgment

the parties in this case on the issue raised by the Rule 60(c) motion, i.e., fraud.

The effect of Rule 60(c) on a mandate from the Supreme Court was considered by Judge Molloy, speaking for Division Two of this Court in First National Bank of Arizona v. Otis Elevator Company, Inc., 8 Ariz. App. 291, 293, 445 P.2d 848 (1968), wherein he pointed out that a motion under 60(c) is as subject to the doctrine of res judicata as a new action would be. The same rule applies under Rule 60(b), Federal Rules of Civil Procedure, which is identical to Arizona Rule 60(c). In 7 Moore's Federal Practice, Sec. 60.30[2], p. 339, the federal rule is stated thus:

> "Where the appellate court has affirmed or reversed, then relief by the district court under 60(b) must reckon with the appellate court's mandate. 'The authorities seem uniform that a mandate from a reviewing court is controlling as to all matters within the compass of such mandate and as to such matters the District Court, after remand can take no further action.' (Citation omitted). At times a motion for relief *will not* raise matters that are within the compass of the mandate, (citation omitted) and in that event the district court clearly has the power to proceed with the 60(b) motion without leave of the appellate court. (Citation omitted)." (Emphasis supplied).

See also 3A Ohlinger's Federal Practice 418, 420 (Rev. Ed. 1964); Perrin v. Aluminum Co. of America, 197 F.2d 254 (9th Cir. 1952); City and County of Honolulu v. United States, 224 F.2d 573 (9th Cir. 1955).

The foregoing authorities require that the application of the doctrine of res judicata be applied in a Rule 60(c) motion where a mandate has issued from the Supreme Court, where the same parties are involved and where the same issues are raised. The exception according to Moore, supra, is where an issue is raised by the motion which does not raise matters within the compass of the mandate. See Restatement, Judgments, Section 70 (1942).

Appellant, in effect, claims that a new issue was raised primarily upon one ground alone—fraud. This fraud arises, he says, from the alleged forgery or fraud in procuring the initial Industrial Commission Form C-407 upon which the defense of waiver was sustained. This argument fails to fully examine the extent of the Supreme Court's decision and mandate in this case. The decision specifically cites Findings of Fact 29, 30, 31, 32 and concludes that, "* * * These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been a waiver. * * *" Those findings are set out in a footnote.[2] In addi-

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[2] "Following his admission to the hospital and on or about April 16, 1962, plaintiff sought and obtained the legal advice of the law firm of Snell & Wilmer, Phoenix, Arizona, and in particular, consulted with Mr. Frederick K. Steiner, Jr., a partner, and Donald Daughton, an associate of that law firm.

"30. On April 16 and again on April 19, 1962, when plaintiff was interviewed by said attorneys while in the hospital, he was lucid and responsive and was able to give an account of the accident and expressed a strong desire to sue his employer for what he believed was their negligence. He advised said attorneys that he had signed some document respecting Workmen's Compensation and that, among other things, said document provided that his benefits would be 65% of $1,000.00 per month.

"31. The plaintiff sought and received legal advice from said attorneys with respect to whether or not he had an option to sue his employer for damages; that he was advised by said attorneys that his sole and exclusive remedy was a claim against the Industrial Commisison of Arizona for Workmen's Compensation Benefits unless his employer failed to comply with the requirements of the Act in obtaining Workmen's Compensation Insurance, posting of notices or availability of rejection slips. Said attorneys advised him that he should accept Workmen's Compensation Benefits, said advice being given both orally and in writing.

"32. After consulting with said attorneys and on or about April 23, 1962, plaintiff executed or caused to be executed and filed with the Industrial Commission of Arizona a document entitled 'Workman's Report of Injuries and Application for Benefits.'"

The court went on to find that claims had been presented, and petitioner was paid compensation in a total sum of $4,795.41, and medical and hospital expense in the sum of $15,246.70. These findings of the court were substantially supported by the evidence. Under these circumstances we do not feel that the court erred in its conclusion that there had been

(Continued on Page A-29)

tion, findings Nos. 33, 34 and 35 made by the trial court in support of its conclusion of its lack of jurisdiction must be examined in the light of appellant's "new issue" allegation of fraud. They are as follows:

"33. Thereafter and on May 23, 1962; June 27, 1962; July 13, 1962; July 20, 1962; July 28, 1962; August 2, 1962; August 16, 1962; September 1, 1962; September 16, 1962; October 1, 1962; October 17, 1962; November 2, 1962; November 16, 1962; and December 2, 1962, plaintiff executed or caused to be executed documents entitled 'Workman's Supplemental Claim for Compensation' and filed or caused the filing of said documents with the Industrial Commission of Arizona, knowing and understanding that these were claims for Workmen's Compensation.

"34. The Industrial Commission of Arizona caused to be paid and plaintiff accepted Workmen's Compensation Benefits pursuant to each of the aforesaid 'Workman's Report of Injury and Application for Benefits' and 'Workman's Supplemental Claim for Compensation' under and pursuant to the provisions of the laws of the State of Arizona for the period from April 10, 1962, through November 16, 1962, in the total sum of $4,795.41.

"35. In addition to the aforesaid Workmen's Compensation Benefits, the Industrial Commission of Arizona paid or caused to be paid medical and hospital expenses of plaintiff in the sum of $15,246.70."

It is true, as appellant alleges, that the mandate quoted with approval the trial court's holding that appellant had made a

(Continued from Page A-28)

a waiver. Since the waiver alone is sufficient, it is not necessary for us to pass upon the other matters raised by the petitioner in regard to the jurisdiction of the court, and having decided this case upon its merits it is not necessary for us to pass upon the propriety or the timeliness of the filing of the writ of certiorari after the time for appeal has expired.

"Judgment affirmed." (at pp. 155-156 of 102 Ariz., at p. 652 of 426 P.2d.)

waiver under A.R.S. Section 23-1024 in these terms: "The plaintiff [appellant], by *making a claim* for Workmen's Compensation benefits and continuing to accept the same with full knowledge of his legal rights and with full knowledge of the legal conditions precedent to a suit against his employer, waived any right or option, if any, which he ever had to file any claim in this Court against his employer." (At p. 155 of 102 Ariz., at p. 652 of 426 P.2d). (Emphasis added). However, assuming actual fraud in the procurement of Form C-407, the initial application in "making a claim"—would this fact alone raise matters which would place appellant's motion outside of the compass of the mandate? We believe that it would not. The decision upon which the mandate is based goes far beyond "making" the initial form C-407 claim, and is based primarily upon appellant's personal knowledge, the legal advice he received, and his continued application for and acceptance of Workmen's Compensation benefits over an extended period of time and therefore if fraud existed initially, it is immaterial. The findings of fact set out herein sufficiently illustrate this point without further elaboration.

It is our opinion, therefore, that the allegation of fraud in the procurement of the original application by appellant does not raise a new issue outside of the compass of the Supreme Court's mandate, and, consequently, the doctrine of res judicata applies in this case to the issue of waiver.

Returning to appellant's first question on appeal, it is clear that under the compass of the Supreme Court's mandate that the trial court did not abuse its discretion in denying the Rule 60(c) motion. It is equally clear that his second question—that the facts shown would probably have changed the result if a new trial were granted—is not supported by the record. Finally, appellant's third question, concerning his due diligence in securing the facts and evidence relied upon for his motion, need not be considered for it adds nothing one way or the other to the disposition of this matter.

The judgment of the trial court is affirmed.

HAIRE and JACOBSON, JJ., concur.

APPENDIX D

PRETRIAL ORDER

A Pretrial conference was held in the above-captioned cause on the 26th day of May, 1964, at 9:30 o'clock a.m. with the following counsel present before the Honorable Jack D. H. Hays, Judge of the above-entitled court, Division 6:

Mr. Charles M. Brewer representing the plaintiff for Messrs. Raoul D. Magana and Charles M. Brewer, attorneys at law.

Mr. Rex H. Moore representing Metro-Goldwyn-Mayer, Inc., for Messrs. Jennings, Strouss, Salmon and Trask, Attorneys at Law.

Mr. Richard J. Daniels, Chief Counsel of the Industrial Commission of Arizona, representing said Industrial Commission and Metro-Goldwyn, Mayer, Inc.

Oral argument was heard on plaintiff's objections to interrogatories and on legal issues regarding defendant's motion to dismiss for lack of jurisdiction. The Court took all of said matters under advisement. Thereafter, Pretrial Conference was continued to May 27, 1964, at 1:30 o'clock p.m. with the same counsel present and, in addition, Mr. William Jones was also present on behalf of the defendant.

IT IS ORDERED that the Preliminary Hearing [heretofore set for June 10, 1964, on the question of defendant's Motion to Dismiss for want of jurisdiction was to proceed to hearing] at that time without a jury.

The Court further indicated that the question of jurisdiction was not to be considered by the jury, and that in the event the Court denied the defendant's motion to dismiss for lack of jurisdiction, the sole issues to be presented to a jury on June 15, 1964, or as soon thereafter as it could be heard, depending on the length of the Preliminary Hearing, were the issues in a normal negligence case. *In other words, the Court would make a determination as to all issues of jurisdiction, election, waiver and other such related matters.*

IT IS ORDERED that the burden of proof at the Preliminary Hearing proceedings on defendant's motion to dismiss for lack of jurisdiction shall be the burden of the defendant.

The Court having heretofore overruled plaintiff's objections to defendant's interrogatories, plaintiff was granted leave to file interrogatories directed to the defendant, and the defendant filed supplemental interrogatories.

IT IS ORDERED that all answers to interrogatories must be filed not later than June 5, 1964.

A general discussion of exhibits to be presented was had, and IT IS ORDERED that all exhibits to be presented at the Preliminary Hearing or at the jury trial must be made available for examination by opposing counsel prior to June 9, 1964.

IT IS FURTHER ORDERED that only exception to the foregoing are exhibits which may be presented for purposes of impeachment.

No amendments were proposed at the Pretrial Hearing.

s Jack D. H. Hays
Judge

Copies mailed
to counsel of record.

APPENDIX E-1

AMENDED AND SUPPLEMENTAL MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE, FRAUD, OTHER SUBSTANTIAL REASONS JUSTIFYING RELIEF

(Extended Oral Argument Requested)

Pursuant to Supreme Court order in cause number 8653, plaintiff moves the Court to set aside the judgment in the above entitled action, dated January 5, 1965, and to grant a new trial pursuant to amended Rule 60(c), Arizona Rules of Civil Procedure, for the following reasons:

1. NEWLY DISCOVERED EVIDENCE.
2. FRAUD.
3. JUDGMENT IS VOID.
4. OTHER SUBSTANTIAL REASONS JUSTIFYING RELIEF, WHEREBY THE PLAINTIFF WAS DENIED A FAIR AND IMPARTIAL TRIAL IN THAT:

A. His signature was *forged* to the Arizona Industrial Commission Acceptance of Benefits Form No. 407 "Waiver," or was not affixed thereto by him knowingly and of his own free will.

(See the affidavit of noted criminologist and examiner of questioned documents, Dr. Paul Kirk.)

B. Industrial Commission Investigator Glenn Jurgemeyer, who purportedly obtained the "Waiver" admitted to Mark Wilmer, Charles Brewer, James D. Lester, and Elmer Snow, that he "did not obtain the Waiver from Morgan" as claimed by defendant.

(See affidavits.)

C. That Jurgemeyer, a witness material to petitioner's case, was purposely instructed by the defendant to hide out of Maricopa County under an assumed name from service of process, and caused said material witness Jurgemeyer to avoid service of process by petitioner.

(See affidavits and sworn statements.)

D. That Jurgemeyer did purposely avoid service of process knowing that the petitioner was about to serve him.

(See affidavits of Attorney for the Industrial Commission C. E. Singer, sworn statements of Industrial Commission Investigator Jack Newman, affidavit of Industrial Commission Investigator Archie Tufts, and Elmer Snow, former Chief Investigator for the Arizona Industrial Commission.)

E. That defendant Metro-Goldwyn-Mayer's auditor, Robert Foss, at the time of the preliminary hearing, gave false testimony to material facts which were completely at variance with a written statement wherein he stated to defendant Metro-Goldwyn-Mayer through said defendant's insurance company representative Tom Malone shortly after the filing of plaintiff's complaint that defendant *did not* have rejection slips available (as required by A.R.S. §23-906(e), and couldn't swear as to the posting of signs. However, at the hearing Foss emphatically testified that signs were posted and that he had rejection slips available. (See partial transcript of record attached hereto.)

F. That plaintiff's counsel has recently been advised by counsel for the Industrial Commission that Jurgemeyer, if allowed to testify would testify that not only was he hidden from service of process to avoid testifying but that if he did testify he would swear under oath that there were no workman's compensation signs posted on the job site at any time prior to petitioner's injury.

(See affidavit of Attorney Charles M. Brewer.)

G. That only after plaintiff's filing April 12, 1965, of his 60(c) Motion for Fraud, etc., Jurgemeyer, for the first time, in a statement to the County Attorney's office, on April 22, 1965, changed his position and claimed he "now" obtained the Form 407 "Waiver." In said statement Jurgemeyer asserted that he did obtain the "Waiver" on the 23rd day of April, 1962, stating that he did so at 10:30 A.M., in the presence of Nurse Krouse, and that Morgan was rational, lucid, amiable and chatted freely

with him about lawsuits, negligence, etc.—this purported claim is dirametically [sic] opposed to affidavits by the physicians and nurse attending Morgan at 10:30 A.M. on April 23, 1962, the hospital notes, nurses' notes, doctors' notes, hospital records and prior statements by Jurgemeyer. The attached affidavits of Doctors Willard S. Hunter and Paul B. Jarrett, coupled with that of registered nurse Eunice Krouse, emphatically show, but not limited to the following:

1. That Jurgemeyer was never in Morgan's room on that date.
2. That Morgan was physically incapable of signing anything on that date.
3. That Morgan was mentally incapable of signing anything on that date.
4. That because of his position on a fracture bed and the fact that his right eye was sewn shut and that he had toxemia, bacteremia and septicemia and a necrotic sacrum, perineum and left leg, (which necessitated amputation) and that the right leg was raised in traction, all rendered Morgan too weak to even feed himself.
5. That he was given 325 milligrams of Demerol that day in four separate shots prior to the operation the afternoon of the 23rd day of April, 1962.

(See affidavits of Dr. Hunter, Dr. Jarrett, Nurse Eunice Krouse, attached hereto, incorporated herein and made a part hereof.)

H. That the affidavit of Nurse Krouse states that a claims investigator for the Industrial Commission attempted to have her testify at the preliminary hearing that Morgan was lucid and rational on or about the 23rd day of April, 1962, and that if she would so state, they would pay her *compensation* from the Industrial Commission of Arizona for so stating. This is further substantiated by the confidential memorandum from Chief Spe-

cial Agent Thomas L. Hall to Chief Counsel Richard J. Daniels dated October 30, 1964.

(Attached hereto)

I. That Jurgemeyer, the "now purported obtainer of the Waiver," impeached former Industrial Commission Attorney Richard J. Daniels and Head Claims Examiner Aaron Nelson by admitting the following:

"I told him of the previous evening activity and told him that in all probability this had something to do with the Morgan trial and asked for instructions. He said that he would attempt to get in touch with Mr. Daniels, Chief Counsel and that I should call him in 30 minutes. I then went to the vicinity of 3rd Street and Portland, where I anticipated I would see a fellow worker, Bill Sawyer. Mr. Sawyer did in fact appear shortly thereafter; he recognized me and stopped. We had a brief conversation and decided to go to the Los Olivas Restaurant for coffee. *At that time, I told him that someone was looking for me the previous evening and in all probability it had to do with the Morgan case.* He then left to go to the office and I told him that I had to call Mr. Nelson. We parted. I then proceeded to the Porterhouse Motel 15th Avenue and Grand. Upon arriving at the Porterhouse I again called Mr. Nelson, this was as I recall about 8:00 or 8:15 A.M. Mr. Nelson stated that he talked to Mr. Daniels and Mr. Daniels instructions were that, for the best interest of the Commission, I should proceed to take the trip to Casa Grande and vicinity. Without hanging up Mr. Sawyer came on the phone and stated that he would bring the Casa Grande trip files to me at the Porterhouse, which he did shortly thereafter. After having coffee with Mr. Sawyer, I went back to my home, picked up my suitcase and proceeded to Florence.

I worked claims in Florence, Coolidge, and Casa Grande. That evening I went to Francisco Grande Hotel out of Casa Grande *and registered under an assumed name.* The next morning about 11:00 AM I called Mr. Nelson from a pay

phone at a service station at the east end of Casa Grande where 2nd Street makes an S turn onto the highway to Eloy. Our secretary answered with a comment, *as I recall "All is forgiven, please come home." I then talked to Mr. Nelson, who stated that the trial of Morgan vs. M.G.M. had been completed."*

(Page 3-4 of Jurgemeyer's affidavit 5/4/67)

That plaintiff was ignorant of the existence of said evidence at the time of the preliminary hearing herein, and that while said evidence existed at that time, plaintiff could not have sooner discovered said evidence in the exercise of due diligence. Said evidence is not merely cumulative or impeaching in character, but is material and of such character and nature that if produced at the trial, it would probably have resulted in a different verdict. Because of the secreting of material witness Jurgemeyer, of which plaintiff's counsel was first advised on March 15, 1965, by attorney of record, Richard J. Daniels, plaintiff employed Dr. Kirk, examiner of questioned documents, to examine plaintiff's purported signature on said Form 407 "Waiver." That as a result of Dr. Kirk's findings of forgery or assisted handwriting, plaintiff's counsel reported said variance to the County Attorney's office, who conducted an investigation and that said investigation revealed the pertinent information contained herein which was unavailable to the plaintiff and while said evidence existed at the time of the preliminary hearing, plaintiff could not have sooner discovered said evidence in the exercise of due diligence.

Respectfully submitted,

[Signature of Charles M. Brewer,
Counsel for plaintiff]

FORM C 407-50M-10-58

Claim No. 5

WORKMAN'S REPORT OF INJURY

And Application for Benefits

USE INK OR TYPEWRITER

TO BE SENT TO
THE INDUSTRIAL COMMISSION OF ARIZONA
PHOENIX, ARIZONA

ANSWER ALL QUESTIONS FULLY

"If to obtain any compensation * * * any person wilfully makes a false statement or representation, he shall be guilty of a misdemeanor, and * * * shall forfeit all right to such compensation * * * after conviction for such offense."—Excerpt from Workmen's Compensation Law.

1. **Employer's name** Utah Construction Company
2. Employer's address 1202 Warley Bldg Black Canyon City Ariz
3. Did your employer have three or more employees at the time of injury? yes
4. **Claimant's name** Robert D. Morgan
5. Address 3160 Colorado Canyon Park Kingman Ariz
6. Social Security No. 572-12-2865 Date of birth 10-3-25 Married X Single
7. Occupation when injured Steelman Were you hired for steady work yes
8. Days worked per week at time of injury (5, 5½, 6, 6½, 7) 6 Hours worked 7:45 am to 6:30 pm
9. Daily wage at time of injury $ 4.36 per hr Hourly wage at time of injury $
10. Time, piece, contract or commission worker time
11. Wages earned from employer during 30 days immediately prior to injury $
12. Did you receive board or lodging in addition to your wage? Value $
13. On reverse side of this form list all employers for year immediately preceding injury date.
14. **Present Injury**—Date sustained April 9-1962 Hour of day 1:00 P m
15. Did you stop work immediately? yes If not, last day worked last ant
16. Date of return to work Wages on return
17. When did you report injury? 4-9-62 To whom? first aid man
18. Give names of at least two material witnesses (if none so state):
    Name unknown Address
    Name Address
19. Where did accident occur? Wagner R.R. trestle Kingman Ariz
20. Name of machine, tool or appliance in connection with which accident occurred Pickup car
21. Was accident caused by another person? If so, by whom?
22. STATE FULLY how accident occurred and describe nature and extent of injury Mr Morgan was employed by defendant on a railroad car fell from the back of the car, and that car passed over & skin, crushed, injured to both legs, head, eye and multiple bruises lacerations of
23. What physician attended you? Doctor Wade Steelman When? 5-APR-25
24. Address of physician To what hospital sent?
25. Names, ages, address and relation of persons totally dependent on you at time of injury
    Eugene Morgan 3 children
26. Do any of such persons work or depend upon any one else or have other source of support?
27. Have you ever received any other injury? no If so, when? Where?
28. What was its nature?
29. Are you receiving disability compensation from any source? no
30. If so, from whom For what reason

PAYMENT APPROVED BY

By this instrument, I make application for benefits to which I may be entitled under the law; and I hereby affirm that all the above statements are true.

Date of signing 4-23-62 **(Sign here)** Robert D. Morgan

NOTE—Kindly write on the back of this sheet any further information, details, or explanations of your answers to the above questions, which will assist the Commission in passing upon your claim.

Kindly send further forms

APPENDIX E-3

AFFIDAVIT OF PAUL L. KIRK

STATE OF CALIFORNIA)
) ss.
County of Alameda)

PAUL L. KIRK, being first duly sworn upon his oath, deposes and says:

I graduated from Ohio State University in 1924, and received my Master of Science degree from the University of Pittsburgh in 1925, and received my Doctor of Philosophy from the University of California in 1927, wherein I have been teaching since 1929. In 1937, I began teaching criminalistics to date, and in conjunction therewith, I have worked as a consultant on questioned documents and handwriting since 1939; I have written several papers and portions of books regarding various aspects of questioned document examination, and in my instruction as a teaching professor in the Department of Criminology at the University of California I teach and direct research in several aspects of document examination. Since 1939 I have testified and investigated several hundred cases throughout the United States in both criminal and civil matters, including examinations of questioned documents for the United States Army, United States Air Force, California State Crime Commission, Internal Revenue Service, and numerous and sundry banks and insurance companies. In addition, I belong to the various technical societies: American Association for the Advancement of Science, American Chemical Society, American Society of Biological Chemists, American Society of Criminology, California Association of Criminalists (charter member), International Association of Forensic Toxicologists (charter member), Austrian Microchemical Society (honorary member), American Institute of Chemists (honorary fellow), New York Academy of Science (honorary fellow), Koninklejke Vlaamse Academie Voore Wetenschappen, Lettern En Schone, Kunsten Van Belgie (honorary fellow).

That on or about the 17th day of March, 1965, I was requested by attorney Charles M. Brewer of Phoenix, Arizona to examine a document which is an Exhibit in the above captioned case, more specifically known as Workman's Report of Injury and Application for Benefits to the Arizona Industrial Commission of Arizona, Form C-407. That on April 1, 1965, I came to Phoenix, Arizona in order to study the original document in question, in the Records Room of the Maricopa County Court House. I made an examination of this document, and I have also examined numerous and sundry other samples of the handwriting of Robert D. Morgan, written on various occasions, to obtain the characteristics of his signature.

That I am of the opinion that the signature at the bottom of the application for benefits purporting to be that of Robert D. Morgan, contains certain variances strongly indicating that this was not his spontaneous writing. The handwriting characteristics and the stroke of the pen are inconsistent with that of Robert D. Morgan, in that I examined this original document with the aid of instruments brought from my laboratory coupled with the assistance of a high-powered microscope which reveals that the signature is not characteristic of his writing, and that there is strong evidence existing showing an abnormal and non-spontaneous writing.

It is my opinion that the signature on the original Form C-407, in the above captioned case, deviates in serious ways from the handwriting of that of Robert D. Morgan, and these deviations are consistent only with the direct intervention by another person who guided the hand of Robert D. Morgan, or alternatively, did the writing independently without any participation by Mr. Morgan.

/s Paul L. Kirk
Paul L. Kirk

APPENDIX E-1

Portion of Recorded Interview

* * * * *

MR. WILMER: Did you see Morgan in the hospital?

MR. JURGEMEYER: No.

* * * * *

MR. BREWER: *Then the MGM man could have gotten it?*

MR. SNOW: I don't know how that was handled out there, really. When I went on location I always saw that they had all kinds of forms.

MR. JURGEMEYER: He was pretty skilled with the basic requirements of the Commission so —

* * * * *

MR. Wilmer: Well let me ask you this:

It says: "Contacted claimant and obtained form 407."

This would apepar, at least, to be the report that someone had contacted the man and gotten the 407?

MR. JURGEMEYER: *Probably I don't know. I don't know anything about it.*

APPENDIX E-5

(Portion of Affidavit of Dr. Willard S. Hunter.)

* * * * *

That I observed Morgan at 9:00 a.m. and again at 10:30 a.m. on the 23rd because of the condition of his leg and the necessity of removing the toxic material which he was absorbing. At 10:30 a.m. I removed the wire sutures from his leg. That I did not see any claims investigator or any other person in or near Morgan at those times heretofore stated, and that I spent at least 15 to 20 minutes on each of these occasions attending Mr. Morgan. *That I, being the attending physician, did instructed the special duty nurses not to let Mr. Morgan be interviewed by anyone or attempt to sign anything of any nature or kind because of his precarious physical condition. From the 15th of April to the 23 of April Morgan was showing signs of increased toxicity. I am of the opinion that he wasn't lucid nor rational from five or six days after he came to the hospital (April 9, 1962) until long after the amputation of his leg. That Morgan was constantly under narcotics and drugs forsooth. I am of the opinion that the large amounts of demerol given Mr. Morgan helped place him in a state of mind of being completely dull and not knowing what was going on. I am of the opinion that Mr. Morgan wasn't able at any time from the 15th of April 1962 until the 24th of April, 1962 to know what he was signing and further, that on the 23rd of April he wasn't physically capable of signing anything because of his position in a fracture bed; and further, that he was weakened with toxemia, bacteremia and septicema to such a state that he wasn't able to feed himself nor physically rise out of the bed.*

FURTHER AFFIANT SAYETH NOT.

s/ Willard S. Hunter, M.D.
Willard S. Hunter

APPENDIX E-6

ICA MEMO TO
BRIBE NURSE

Form G-502-A 10M 10-63

MEMORANDUM

CONFIDENTIAL

DATE: October 30, 1964

RE: Eunice J. Krouse
Claim Nos. AZ 11555 &
AZ 31202

TO: Richard J. Daniels, Chief Counsel

FROM: Thomas L. Hall, Chief Special Agent

These are two similar cases involving two different findings by the Commission.

The nature of the injuries is the same — staph-infection. *The problem is: Why did we accept one and deny the other?*

Background:

This nurse is one of those involved in the R. M. Morgan (MGM) case. She had admitted upon interview that she had signed his C413's in that case. At the same interview I recall that she complained of the amount of compensation paid to her (1st injury). This latter information was apparently relayed to the claims department and she was paid $310.29 total in compensation and $84.00 in medical.

The second case was denied and timely protested. In both cases the County Hospital has declined to admit that Krouse was an employee.

Generally, it is felt by the undersigned, that in view of the fact that we accepted and paid the first claim, that we should also pay the second.

Confidentially, it was believed that at the time of the Morgan case that her testimony would be of great value. However, it was decided that it was not to be used, apparently, as I have no

further personal knowledge of the case. *I think that compensation was paid on the original case in order to put her in a more cooperative frame of mind.*

s/ Thomas L. Hall
Thomas L. Hall
Chief Special Agent

TLH: ew

APPENDIX E-

AFFIDAVIT

STATE OF ARIZONA)
COUNTY OF MARICOPA) SS

EUNICE J. KROUSE, being first duly sworn, on oath deposes and says:

That I reside at 2829 West Palo Verde Drive, that I have been a registered nurse since 1931 and have practiced for the past twenty-two years in the State of Arizona; that I attended Mr. Robert D. Morgan on the day shift for four months. That my duties as special duty nurse to Mr. Morgan started on April 16, 1962 and continuously remained with him for four months. That I have reviewed my nurses notes and that it is my opinion *that on April 23, 1962 Morgan could not sign his name to any paper because of the severity of his injuries and his toxic condition.* That it was necessary to refrain all student nurses from coming into his room and it was frequently necessary to request the help of male orderlies; that from the time that I first started caring for him until long after the amputation of his leg on May 5, 1962, he was on massive doses of narcotics and tranquilizers. That Mr. Morgan on the 23rd of April, 1962 wasn't able to turn or move because of his weakened condition and also being confined to a fracture bed. That Mr. Morgan was in such a confused state of mind that he would frequently attempt to call the President of the United States and numerous professional golf playing friends of his, until we had to remove the phone from his room.

From my long years of nursing I am of the opinion that Mr. Morgan wasn't rational nor lucid nor able to make any decisions to determine his legal rights from the 16th day of April, 1962 until long after the amputation of his leg on May 5, 1962. During this period of time he was constantly complaining of pain, requesting narcotics and necessitating constant medical attention. The right side of his face was open and infected necessitating hot packs, that his head was lacerated and he was literally scalped.

His left leg had loss of much bone, and was gangrenous and necessitated being left open because of the massive infection and deterioration thereof. That Drs. Johnson, Hunter and Jarrett attended him daily attempting to cut away the putrified flesh and maintain a balance of his electrolite system by the use of steroids. That Mr. Morgan was in extremely poor condition from April 16 to May 5, 1962, that he was suffering from toxcemia, bacterima, and septicima. That he had an extensive wound on the sacrum and perineum with a compound fracture of the sacrum which turned the sacrum to his right and a large flap was open. He also had an extensive soft tissue wound which involved the rectum and anus and some of the sacral nerves on the right side. There had been a large foreign body removed from this area which was taken by the doctors to be a piece of railroad tie embeded in the peri-rectoral area; that he had compound fractures in both of his legs with extensive lacerations about the face and scalp; that his right eye was sutured shut. That on the 23rd day of April, 1962 it was obvious that Mr. Morgan had necrotic tissue which had been killed by bacteria in the area of the perineum and in the left leg. That his condition was very grave and very poor, and that his perineum and sacrum area was severly lacerated and needed constant packing and debridment of dead flesh; that Mr. Morgan was unable to have bowel movements which I, by necessity, had to extricate by hand from his colon which was exposed.

That I had been instructed by the doctors to keep track of everyone who came into the room and to not allow any claims adjusters or investigators to visit with Morgan because of his obvious toxic condition. That Mr. Morgan could not control nor physically hold a fountain pen nor write on and subsequent to April 23, 1962. That it was necessary for me to feed him because of his weakened condition and his inability to feed himself. That Mr. Morgan was on massive doses of steroids and that he was quite irrational prior to and on the 23rd day of April, 1962. That he could not sign cards or notes, nor write, and it was only

long after the amputation of his leg on May 5, 1962, that I would assist him to write his name. *I was reminded by Dr. Clare Johnson, Mr. Morgan's plastic surgeon, to make notes of any gifts or anyone coming into the room; that I know that no claims examiner or investigator for the Industrial Commission of Arizona came into Morgan's room on the 23 day of April, 1962, nor was I approached by one Glen Jurgemeyer purporting to be a claims investigator of the Industrial Commission of Arizona. That Mr. Morgan, prior to the amputation of his leg, was being attended by a psychiatrist,* that it was necessary for us to sign the 413 claim forms in order for the doctors to be paid. *That there was never a Form 407 nor any type of waiver form ever left with Mr. Morgan by anyone regarding the receipt of benefits from the Industrial Commission of Arizona.*

That on or near the First of June, 1964, just prior to the preliminary hearing regarding Robert Morgan's suit against Metro-Goldwyn-Mayer, an investigator from the Arizona Industrial Commission came to my house ostensively to discuss compensation regarding a staphylococcus infection that I received at a hospital, *and intimated that if I would cooperate with these investigators that Mr. Morgan was lucid and rational at or near the time he was supopsed to have executed an acceptance of of benefits and waiver form, that they would assist in approving my claim with the Industrial Commission of Arizona and expedite same.*

That my husband was also present and when he heard these investigators of the Arizona Industrial Commission try to change my opinion regarding Mr. Morgan's toxicity and irrationality he became irate and ordered them off our property.

That during Mr. Morgan's entire hospitalization he constantly spoke of and raved of the negligence of the individual operating the logs that fell upon him, this individual to the best of my knowledge was the son of the vice-president of Metro-Goldwyn-Mayer, and *that Morgan was highly incensed because of the way the accident happened and continuously spoke of filing a*

law suit against Metro-Goldwyn-Mayer and claimed it was his intentions as soon as he got out of the hospital to sue Metro-Goldwyn-Mayer for the negligence of their vice-president's son.

FURTHER AFFIANT SAYETH NOT.

s/ Eunice J. Krouse
EUNICE J. KROUSE

APPENDIX E-8

(Portion of Affidavit of Industrial Commission of Arizona chief referee)

* * * * * *

At approximately the middle of March, 1965, affiant had a conversation with Industrial Commission Claims Investigator Glenn E. Jurgemeyer concerning his part in the investigation in connection with the claim of one Robert D. Morgan v. Metro-Goldwyn-Mayer, Inc. and The Industrial Commission of Arizona. This conversation took place in my Commission office at 1616 West Adams Street, Phoenix, Arizona, and at that time Elmer E. Snow, a former Claims Reviewer for The Industrial Commissioner was also present. Mr. Jurgemeyer related to Mr. Snow and myself that he, Jurgemeyer, had been instructed to avoid process of service and to remain out of sight to avoid being subpoenaed to testify in the preliminary hearing of Morgan v. M.G.M.

Jurgemeyer further stated that on his return home one day during the pendency of said hearing, he observed an automobile parked in front of his residence, and that he suspected it was a process server. That he entered his house through the rear entrance and called his immediate superior, Aaron Nelson, for instructions; that Mr. Nelson advised Mr. Jurgemeyer that he would call Richard J. Daniels, then Chief Counsel for the Industrial Commission of Arizona, to ascertain what counsel desired him to do; *that instructions given by Chief Counsel, Richard J. Daniels, were that Mr. Jurgemeyer* was to remain out of sight and or leave town *to avoid being served with process of service and to avoid said process at all costs.*

/s C. E. Singer, Jr.
C. E. SINGER, JR.

APPENDIX E-9

(Portion of interoffice memorandum of Jurgemeyer to chief counsel)

At that time, I told him that someone was looking for me the previous evening and in all probability it had to do with the Morgan case. He then left to go to the office and I told him that I had to call Mr. Nelson. We parted. I then proceeded to the Porterhouse Motel 15th Avenue and Grand. Upon arriving at the Porterhouse I again called Mr. Nelson, this was as I recall about 8:00 or 8:15 AM. *Mr. Nelson stated that he talked to Mr. Daniels and Mr. Daniels instructions were that, for the best interest of the Commission, I should proceed to take a trip to Casa Grande and vicinity.* Without hanging up Mr. Sawyer came on the phone, and stated that he would bring the Casa Grande trip files to me at the Porterhouse, which he did shortly thereafter.

Page 4 May 4, 1967

To: Mr. Robert K. Park, Chief Counsel

After having coffee with Mr. Sawyer, I went back to my home, picked up my suitcase and proceeded to Florence.

I worked claims in Florence, Coolidge, and Casa Grande. That evening I went to Francisco Grande Hotel out of Casa Grande and registered under an assumed name. The next morning about 11:00 AM I called Mr. Nelson from a pay phone at a service station at the east end of Casa Grande where 2nd Street makes an S turn onto the highway to Eloy. Our secretary answered with a comment, as I recall *"All is forgiven, please come home"*. *I then talked to Mr. Nelson, who stated that the trial of Morgan vs. M.G.M. had been completed.* I told him that I had to work through Wednesday in the Casa Grande area.

APPENDIX F-1

UNITED STATES CONSTITUTION
AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX F-2

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F-3

ARTICLE 2 § 23. Constitution of Arizona

Section 23. The right of trial by jury shall remain inviolate, but provision may be made by law for a jury of a number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of a jury in civil cases where the consent of the parties interested is given thereto.

APPENDIX F-4

ARTICLE 18 § 6, Constitution of Arizona

Section 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

APPENDIX F-5

ARTICLE 18 § 8 Constitution of Arizona

Section 8. The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the State, or any political sub-division or municipality thereof as may be defined by law and in such private ~~employments as the Legislature~~ may prescribe *by which compensation shall be required to be paid to any such workman,* in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or ~~a necessary risk or~~ danger inherent in the nature thereof, *or by failure of such employer, or any of his or its agents* or *employee or employees to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional* with any employee engaged in any such private employment to settle for such compensation, or to retain the right *to sue said employer as provided by this Constitution;* * * *

APPENDIX F-6

§ 23-906. LIABILITY UNDER CHAPTER OR UNDER COMMON LAW OF EMPLOYER SECURING COMPENSATION; RIGHT OF EMPLOYEE TO MAKE ELECTION; PROCEDURE FOR MAKING ELECTION

A. Employers who comply with the provisions of § 23-961 as to securing compensation shall not be liable for damages at common law or by statute, except as provided in this section, for injury or death of an employee wherever occurring, but it shall be optional with employees to accept compensation as provided by this chapter or to reject the provisions of this chapter and retain the right to sue the employer as provided by law.

B. The employee's election to reject the provisions of this chapter shall be made by a notice in writing, signed and dated by him and given to his employer, in duplicate in substantially the following form: "To (name of employer):

You are hereby notified that the undersigned elects to reject the terms, conditions and provisions of the law for the payment of compensation, as provided by the compulsory compensation law of the state of Arizona, and acts amendatory thereto."

C. The notice shall be filed with the employer prior to injuries sustained by the employee, and thereafter within five days the employer shall file with the commission the duplicate of the notice so served by the employee. All employees shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this chapter unless the notice in writing has been served by the employee upon his employer prior to injury.

D. Every employer engaged in the occupations designated in this chapter shall post and keep posted in a conspicuous place upon his premises, in all languages spoken by his employees and available for inspection by all workmen, a notice in substantially the following form:

"All employees are hereby notified that in the event they do not specifically reject the provisions of the compulsory compensation law they are deemed by the laws of Arizona to have accepted the provisions of such law, and to have elected to accept compensation under the terms of such law, and that under the terms thereof employees have the right to reject the same by written notice thereof prior to any injury sustained, and that blanks and forms for such notice are available to all employees at the office of this company."

E. If an employer fails to post and keep posted the notice as required by this section, or fails to keep available at the place where the employees are hired the blank forms of notice to be signed by the employee, no employee who thereafter engages in employment for such employer, during the time that the notices are not posted or during the time that the blanks are not available, shall be deemed to have accepted the provisions of this chapter, and it shall be optional for such employee, if injured during the period when blanks were not available or the notice was not posted, to accept compensation under the provisions of this chapter or maintain other action against the employer.

APPENDIX F-7

§ 23-1061 A.R.S. Application for Compensation.

A. An employee entitled to compensation shall file with the commission an application therefor together with the certificate of the physician who attended him. The physician *shall inform* the *injured employee of his rights under this chapter and shall give all necessary* assistance in making the application for compensation and such proof as required by the rules of the commission without charge.

APPENDIX F-8

RULE 60(c) ARIZONA RULES OF CIVIL PROCEDURE

60(c) Mistake; inadvertence; surprise; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. Amended July 14, 1961. Effective on and after midnight Oct. 31, 1961.